

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UTICA MUTUAL INSURANCE COMPANY,

Plaintiff,

v.

LIFEQUOTES OF AMERICA, INC., and
JERRY COOPER, INC., d/b/a COLOR
ONE PHOTOLAB,

Defendants.

NO. CV-06-0228-EFS

**ORDER RULING ON MOTIONS TO
STRIKE, GRANTING COOPER'S RULE
56(f) MOTION TO SUSPEND SUMMARY
JUDGMENT MOTIONS, AND SETTING
STATUS CONFERENCE**

A telephonic hearing was held on November 15, 2007, in the above-captioned matter. Before the Court were Plaintiff Utica Mutual Insurance Co.'s (Utica) Motion to Strike (Ct. Rec. 77) and Defendant Jerry Cooper, Inc.'s (Cooper) Motions to Strike (Ct. Rec. 82) and Rule 56(f) Motion to Suspend Summary Judgment Motions (Ct. Rec. 108). James Derrig, Thomas Stratton, and Lon Beck appeared on behalf of Utica; Frederick Schoepflin, Mark Griffin, and Margaret Wetherald appeared on behalf of Cooper. After hearing from counsel and reviewing the submitted material and relevant authority, the Court is fully informed; this Order serves to supplement and memorialize the Court's oral rulings on the motions to strike and to grant the requested discovery continuance.

///

1 **A. Background**

2 LifeQuotes of America, Inc. (LifeQuotes) was an insurance agent
3 that provided insurance provider rates and information to potential
4 insureds. LifeQuotes contracted with Fax.com to send advertisements by
5 fax to potential insureds. In 2001, however, Fax.com was court ordered
6 to stop sending unsolicited advertisements.

7 Based on its advertising contract with Fax.com, LifeQuotes was sued
8 for violating the Telephone Consumer Protection Act, 47 U.S.C. § 227.
9 One of these lawsuits was brought by Cooper in King County Superior
10 Court. After receiving an order of default against LifeQuotes, Cooper
11 sent a copy of this order to Utica, LifeQuotes' insurer. Upon
12 notification of the lawsuit, Utica informed Paul Piubeni, LifeQuotes'
13 president, that it would not defending or indemnifying LifeQuotes.
14 Approximately six weeks later, Utica reconsidered and advised LifeQuotes
15 that it would defend LifeQuotes in the Cooper state court action under
16 a reservation of rights. Utica then filed the instant action seeking
17 declaratory relief that it has no duty to defend or indemnify
18 LifeQuotes.

19 Joanne Blackburn, an attorney retained by Utica to defend
20 LifeQuotes in the Cooper state court action, successfully set aside the
21 default order. Thereafter, King County Superior Court Judge Dean Lum
22 certified the Cooper lawsuit as a class action. Cooper and LifeQuotes
23 reached a tentative settlement agreement whereby Cooper would receive
24 all of LifeQuotes' claims against Utica in exchange for \$10 million,
25 subject to a covenant that Cooper would not execute any judgment against
26 LifeQuotes, Mr. Piubeni, or his family. Utica intervened to oppose the
27

1 settlement agreement. After a hearing, Judge Lum concluded the
2 settlement was unreasonable. Judge Lum subsequently entered an
3 \$8,949,000.00 judgment against LifeQuotes; this amount was based on the
4 number of unsolicited faxes received by prospective insureds, not the
5 number of unsolicited faxes sent by Fax.com.

6 In this action, the parties filed dispositive motions asking the
7 Court to determine whether coverage for Cooper's claims exist under
8 Utica's insurance policies and whether Utica engaged in bad faith. In
9 connection with the dispositive motions, motions to strikes were filed.
10 The Court ruled on the motions to strike at the November hearing for the
11 reasons stated on the record and memorialized herein. After the
12 dispositive motions were fully briefed, Cooper sought to continue the
13 dispositive motions hearing in order to conduct discovery related to the
14 recently-discovered Fax.com invoices; this is because the invoices set
15 forth a significantly larger number of unsolicited faxes received than
16 the number told to Judge Lum. After discovering this documentation,
17 Cooper presented it to Judge Lum, who entered a Supplemental Judgment in
18 the amount of \$86,252,500.00, thereby achieving a total judgment of
19 \$95,201,500.00 against LifeQuotes.

20 **B. Utica's Motions to Strike**

21 The Court grants in part and denies in part Utica's Motions to
22 Strike. The Court declines to strike Exhibit I or J to the Griffin
23 Declaration (Ct. Rec. 57); however, the second sentence of ¶ 26 in
24 Cooper's Statement of Specific Facts (Ct. Rec. 56) makes an
25 impermissible inference because it infers a conclusion from non-
26 privileged information concerning privileged information. Therefore,
27

1 the Court strikes the second sentence of ¶ 26. Also, because the
2 parties agree that the term "professional services" is unambiguous, the
3 Court strikes the Lanning Declaration (Ct. Rec. 58) as inadmissible
4 parol evidence.

5 **B. Cooper's Motion to Strike**

6 The Court denies Cooper's motion. First, the Court declines to
7 strike the Walters Declaration and attached June 29, 2006, letter (Ct.
8 Rec. 64) because Utica did not gain any strategic advantage and Cooper
9 was not substantially harmed by the letter's late disclosure. Second,
10 the Court declines to strike the tender argument raised in Utica's reply
11 (Ct. Rec. 63 pp. 2-4) because Utica presented this issue to rebut an
12 argument raised in Cooper's response (Ct. Rec. 55). Lastly, the Court
13 declines to strike Utica's Supplemental Submission (Ct. Rec. 65) because
14 *Woo v. Fireman's Fund Insurance Co.*, 161 Wash. 2d 43 (2007), was not
15 decided until July 2007; Cooper had an opportunity to address *Woo* in its
16 own cross-motion for summary judgment; and Utica's reply and
17 supplemental brief together comply with Local Rule 7.1(f)'s twenty-page
18 limitation for dispositive memorandum. For these reasons, the Court
19 denies Cooper's Motion to Strike.

20 **C. Cooper's Rule 56(f) Motion to Suspend Summary Judgment Motions**

21 Upon discovering the Fax.com invoices in the fall of 2007 (after
22 the dispositive motions were fully briefed) and learning of a possible
23 non-disclosure of these invoices by Utica and Ms. Bradburn in the state
24 court action, Cooper filed a motion pursuant to Federal Rule of Civil
25

1 Procedure 56(f)¹ to conduct discovery regarding the scope of the
2 nondisclosure of the Fax.com invoices and the information contained
3 therein regarding the number of unsolicited faxes received. Cooper
4 contends that the failure to disclose the Fax.com invoices may
5 constitute bad faith on Utica's part and, therefore, wishes to depose
6 Ms. Blackburn, Ms. Blackburn's associate, as well as Utica's coverage
7 counsel, national counsel, and claims professionals.

8 Utica opposes the continuance request on the grounds that the
9 motion is untimely and Cooper cannot satisfy Rule 56(f) requirements
10 because Cooper is not a proper moving party and Cooper is not seeking to
11 discover "essential" facts. The Court is not persuaded by Utica's
12 arguments and grants Cooper's motion for the reasons set forth below.

13 First, the Court finds the motion timely even though "a Rule 56(f)
14 motion normally should precede or accompany the response to the summary
15 judgment motion." *Mass. Sch. of Law, Inc. v. Am. Bar Ass'n*, 142 F.2d
16 26, 44 (1st Cir. 1998). Cooper filed the Rule 56(f) motion upon receipt
17 of the Fax.com invoices, which was after the pending dispositive motions
18 were fully briefed. Second, the Court concludes Cooper is a proper
19 moving party under Rule 56(f) because it is seeking discover facts to
20 oppose Utica's summary judgment motions. Lastly, the Court finds Cooper
21

22 ¹ Federal Rule of Civil Procedure 56(f) states:

23 If a party opposing the motion shows by affidavit that, for
24 specified reasons, it cannot present facts essential to
justify its opposition, the court may:

- 25 (1) deny the motion;
26 (2) order a continuance to enable affidavits to be
obtained, depositions to be taken, or other discovery to be
undertaken; or
27 (3) issue any other just order.

1 is seeking to conduct discovery into essential facts. The Fax.com
2 invoices clearly set forth the number of received faxes - a number that
3 was critical to Judge Lum's decision to not accept the negotiated
4 settlement between LifeQuotes and Cooper, a settlement objected to by
5 Utica. Whether Utica objected to the negotiated settlement with
6 knowledge that there was documentary evidence that the number of
7 received unsolicited faxes was significantly larger than that told to
8 Judge Lum is a fact essential to whether Utica engaged in bad faith.

9 "[A]n insurance company's duty of good faith rises to an even
10 higher level than that of honesty and lawfulness of purpose toward its
11 policyholders; an insurer must deal fairly with an insured, giving equal
12 consideration *in all matters* to an insured's interests." *Tank v. State*
13 *Farm Fire & Cas. Co.*, 105 Wn. 2d 381, 386 (1986). If an insurer fails
14 to settle within policy limits, the insurer may breach the duty of good
15 faith. *Id.* at 387. In addition, Utica had a duty to retain competent
16 defense counsel for LifeQuotes and "refrain from engaging in any action
17 which would demonstrate a greater concern for [its] monetary interest
18 than for [Lifequotes'] financial risk." *Id.* at 388; see also *Mut. of*
19 *Enumclaw v. Dan Paulson Constr.*, 1161 Wn. 2d 903 (2007). Here, the
20 negotiated settlement likely exceeded the policy limits; however, the
21 negotiated settlement provided Mr. Piubuni and his family a complete
22 release and was significantly less than the judgment to be incurred by
23 LifeQuotes if the Fax.com invoices were used to determine the number of
24 received unsolicited faxes. Whether an insurer engages in bad faith by
25 knowingly exposing an insured to extraordinary excess liability need not
26 be resolved today; at this time, it is sufficient that the Court finds
27

1 discovery into the scope of the nondisclosure relating to the Fax.com
2 invoices is necessary.

3 A discovery continuance on this issue is critical before the Court
4 rules on both the coverage and the bad faith motions for summary
5 judgment because, if Utica is found to have engaged in bad faith, it is
6 estopped from denying coverage. *See Safeco Ins. Co. of Am.*, 118 Wn. 2d
7 at 392. In addition, Utica then may be liable for the judgment against
8 LifeQuotes. *See Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn. 2d 730,
9 735 (2002). Accordingly, Cooper's motion is granted. The parties shall
10 meet and confer, in advance of the April 17, 2008, status conference, to
11 develop a discovery plan.

12 **D. Cooper's Motion to Seal Document Pursuant to Rule 26(B)(5)(B)**

13 Cooper seeks leave to file document No. ULCF000974-976 under seal.
14 Given the substance of the document, the Court finds the sealing of the
15 document serves the compelling interest of protecting claimed work
16 product and that absent sealing there is a substantial probability that
17 this compelling interest would be harmed. *See Oregonian Publ'g Co. v.*
18 *U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990) (citing *Press-*
19 *Enter. Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 13-14 (1986)). Accordingly,
20 Cooper's motion to seal is granted.

21 For the reasons given above, **IT IS HEREBY ORDERED:**

22 1. Utica's Motion to Strike (Ct. Rec. 77) is **GRANTED IN PART and**
23 **DENIED IN PART.**

24 2. Cooper's Motion to Strike (Ct. Rec. 82) is **DENIED.**

25 3. Cooper's Rule 56(f) Motion to Suspend Summary Judgment Motions
26 (Ct. Rec. 108) is **GRANTED.**

